

CRIMINAL APPEAL (DB) No. 462 OF 1988

Against the judgment of conviction dated 5.8.1988 and order of sentence dated 06.08.1988 passed by Sri Rajendra Prasad Choudhary, Fourth Additional Sessions Judge, Purnia in Sessions Trial No. 193 of 1984/91 of 1987.

1. Baleshwar Ray son of Khushilal Roy
2. Pancham Roy son of Nathuni Roy
3. Dara Paswan son of Kairku Paswan
all resident of village Gorhiyari,
P.S. Farbesganj, District Purnea
4. Rajendra Mandal son of Sadanand Mandal
resident of Chaura, Parwaha, P.S. Farbesganj,
District Purnea ----- Appellants

Versus

The State of Bihar ----- Respondent

For the appellants : Mr. Anirudh Kr. Sinha
For the State : Ms. Shashi Bala Verma, Addl. P.P.

P R E S E N T

THE HON'BLE MR. JUSTICE SHYAM KISHORE SHARMA
THE HON'BLE MR. JUSTICE DINESH KUMAR SINGH

S.K. Sharma
&

D.K. Sharma, JJ.

Four appellants have challenged the judgment of conviction dated 05.08.1988 and order of sentence dated 06.08.1988 passed by Fourth Additional Sessions Judge, Purnia in Sessions Trial No. 193 of 1984/91 of 1987, whereby and whereunder appellants have been convicted under Section 396 of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for life. Though altogether ten accused persons were put on trial but the remaining six accused persons were acquitted by the Trial Court.


2. We are inclined to mention the prosecution case in brief in order to elucidate

the grounds of appeal taken by the appellants. The prosecution case starts rolling with the fardbeyan of Abdul Jabbar (P.W.10) recorded by S.I. S.K.Singh, Officer-in-Charge, Forbesganj police station on 30.10.1983 to the effect that on 29th October, 1983 the informant along with his family members was sleeping in the west northern room, whereas the informant's elder brother's family were sleeping in the southern room. In the meanwhile, at about 10.00 P.M. the informant saw torch light being flashed in the courtyard and then 4-5 persons entered into his room, caught hold of him and assaulted him with *lathis* and then dragged the informant to the *Baithka* and then informant's hands were tied with some clothes. Thereafter the accused persons tied the hands of Master Sanaullah (P.W.2) and while the accused persons were taking the informant to his *Baithka*, he noticed 20-25 persons in the courtyard and near his door and one of them was armed with gun and others were armed with *lathis*. The dacoits, who were in the courtyard, started looting the articles from the room and they were asking the sister-in-law (bhabhi) of the informant about



Moulvi who replied that he went somewhere in the morning and then the accused persons enquired about the cash amount and then they looted the clothes, ornaments, utensils and cash etc. from the room of the informant and his brother and at the time of dacoity, three or four dacoits armed with lathis were guarding outside the house of the informant. It is also alleged that in course of dacoity, the informant's brother (P.W.6) was also assaulted. On hearing alarm, some persons of the village assembled near the house of Abdul Rahman (P.W.3) and they also started raising alarm and then they set a heap of santhi (straw) on fire. On seeing the flames of fire, the dacoits standing outside the house asked other accused to come out as the villagers have assembled. On this the dacoits started fleeing away and while fleeing away, they resorted to firing, of which first fire was made at the door of the informant whereas second fire was made when they went towards north and third firing was made while the dacoits were leaving the mohalla of the informant. After the miscreants fled away, the other villagers came






and untied the informant and Sanaullah, P.W.2. They told the informant that Md. Aiyub has been seriously injured by gun shot and five or six persons have also received gun shot injuries. After about half an hour, Md. Aiyub succumbed to his injuries. It is alleged that the accused persons were wearing half pant and baniyan. The informant asserted that he saw the faces of the dacoits in the torch light, which was being flashed by the dacoits themselves. They were young and some of them had concealed their face. The informant has also given the list of the looted articles in his fardbeyan. P.W.1 Md. Mansoor Alam and P.W.2 Md. Sanaullah were made attesting witnesses to the first information report. Consequently, Forbesganj P.S. Case No. 0190 dated 29/30.10.1983 under Section 396 of the Indian Penal Code was registered. Fardbeyan has been marked as Ext.2/1 and formal F.I.R. has been marked as Ext.5.

3. The police after investigation submitted chargesheet and after commitment, ten accused persons were put on trial. Charge under Section 412 of the Indian Penal Code was framed

against accused Kamla Amat, Kamaldeo Sah and Jagdeo Sah whereas charge under Section 396 of the Indian Penal Code was framed against other eight accused persons including that of Kamla Amat. Charges were explained to the accused persons, to which they pleaded innocence.


4. The prosecution in order to substantiate its case examined 15 witnesses, of which P.W.1 Md. Mansoor Alam is a co-villager and attesting witness to the fardbeyan but his statement under Section 161 of the Code of Criminal Procedure has not been recorded. P.W.2 Md.Sanaullah is the brother-in-law (Sala) of informant P.W.10. He is also an attesting witness to the fardbeyan. P.W.3 Abdul Rahman is neighbour of the informant whose son Md.Aiyub died due to gun shot injuries in course of dacoity. P.W.4 is Badaruddin whose statement under Section 161 of the Code of Criminal Procedure has not been recorded. P.W.5 Ram Bilash Rai is a Judicial Magistrate who conducted the test identification parade. P.W.6 Abdul Sattar is brother of informant P.W.10, who has not identified the appellants in dock. P.W.7 Khabirul Islam is one of the injured.



P.W.8 Haseena Begum is wife of the informant P.W.10, while P.W.9 Mufida Khatoon is wife of P.W.6. Both P.Ws. 8 and 9 have been tendered. P.W.10 Abdul Jabbar is the informant of the case. P.W.11 is Dr.Mohammad Habibullah who conducted the autopsy over the dead body of deceased. P.W. 12 Mohiuddin has also been tendered. P.W.13 Sudhir Kumar Singh is the Investigating Officer of the case. P.W.14 Jaganand Singh is a formal witness. He has proved the writing and signature of Block Development Officer who had arranged the test identification of the articles recovered. P.W.15 Krishna Kant Jha is also a formal witness who proved the security bond through which the seized articles were released in favour of the informant.

5. The defence has also examined one witness namely, Laxman Mandal who has proved the sale deed Exts. B/1 and B/2 in order to prove that accused Kamla Amat has been falsely implicated in the case.


6. The learned Trial Court disbelieved the recovery and identification of articles from the house of accused Kamla Amat, Kamdeo



Singh and Jagdeo Sah on the ground that some witnesses stated that the T.I.Parade of the recovered articles were made at Block Office, whereas others suggested that it was done at the police station. It is a fact that these accused persons were known to the prosecution witnesses, hence they ought to have been named in the first information report. So far as the present four appellants are concerned, the learned Trial Court relied on the evidence of identification by P.Ws. 1,2,4,6 and 10 and disbelieved the suggestions of the defence that these appellants were also known to the informant and accordingly, these four appellants have been convicted and sentenced, as stated above.


7. The factum of dacoity and death of Md.Aiyub are admitted facts. The only question to be decided by the Trial Court was whether the accused persons, put on trial, participated in the occurrence or not.

8. So far as the presence of appellants at the time of occurrence is concerned, the Trial Court has relied on the evidence of their identification by the




witnesses. So far as the manner of identification is concerned, the prosecution witnesses have put forward two means of identification; one is torch light flashed by the accused persons and other is the flame of the light of fire coming from the heap of santhi (straw) which was set on fire by the villagers, though during test identification parade, the prosecution witnesses stated about the identification of the accused persons in the flash of torch light which was used by the accused persons themselves.

9. Admittedly, the alleged torch was not recovered as P.W.13 (I.O.), in paragraph 14 of his evidence, has stated that no torch or lantern was produced. P.W.10, the informant, has admitted that the night was dark. T.I.Chart reflects that the prosecution witnesses have solely relied on the light generated by the burning of heap of santhi (straw). So far as the burning of heap of santhi (straw) is concerned, as per first information report it appears that something was burning near the house of P.W.3. Though P.W.1, in paragraph 2 of his evidence, suggests that the santhi was



burning at the door of P.W.10, whereas P.W.2, in paragraph nos. 1 and 8 has suggested that fire was lit near the baithka of P.W.10. P.W.4 in paragraph 1 and P.W.6 in paragraph 5 have stated that it was near the house of P.W.3 though P.W.3 in paragraph 1 has claimed that the villagers set the santhi on fire. This witness in paragraph 5 has claimed that heap of santhi was his own. P.W.13 the Investigating Officer in paragraph 4 has stated that something was burning towards 100 yards north to the house of P.W.10. It appears that the adjacent place of burning of santhi has not been proved by the prosecution witnesses but considering the totality of the evidences of prosecution witnesses, it appears that it was burning near the house of P.W.3. The distance between the house of P.W.3 and P.W.10 has been given by P.W.13 (I.O.), in paragraph 4, to be 100 yards whereas P.W.10 in paragraph 5 has suggested that the distance between his house and P.W.3 is about 200 hands. Admittedly, the family members like P.W.6 and P.W.10 are residing in the same house. The informant and his brother never claimed to have gone near the



house of P.W.3. Hence the identification of the dacoits by P.Ws. 6 and 10 in the light generated by the burning of santhi (straw) appears to be doubtful. So far as other witnesses like P.Ws. 1,2, and 4 are concerned, they assembled near the house of P.W.3 after hearing alarm. Admittedly, P.Ws. 1 2, and 4 assembled after the act of dacoits was over. Hence, the identification being made only in the light generated due to burning of santhi, appears to be doubtful. Admittedly, the conviction of the appellants is solely on the ground of their being identified by P.Ws. 1,2,4,6 and 10.

10. The settled principle is that the court is bound to follow the rule that evidence as to the identification of an accused person, must be such as to exclude with reasonable certainty the possibility of an innocent person being identified. The evidence of identity must be thoroughly scrutinized, giving the benefit of doubt to the accused; but if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not

to feel shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification.

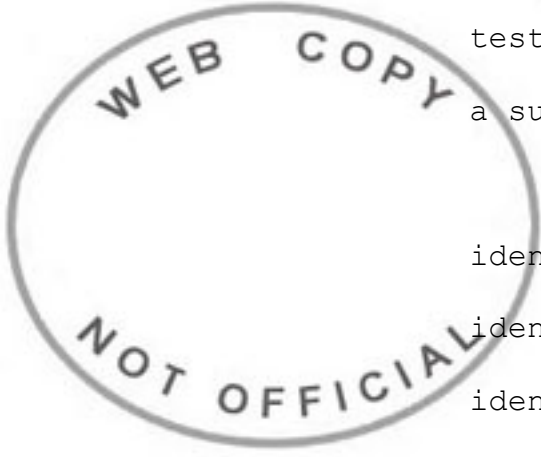
11. The conviction can be based solely on the identification evidence, provided certain conditions are fulfilled; such as: (1) Did the identifier know the accused from before ? (2) Did he see him anytime between the crime and the test identification ? (3) Was there unnecessary delay in the holding of the test ? (4) Did the Magistrate take sufficient precautions to ensure that the test was a fair one ? (5) What was the state of the prevailing light ? (6) What was the condition of the eyesight of the identifier ? (7) What was the state of his mind ? (8) What opportunity did he have of seeing the offenders ? (9) What were the errors committed by him ? (10) Was there any outstanding features or conduct of the accused which impressed him ? (11) How did the identifier perform at other test identifications held with respect of the same offence ? (12) Was the quantum of identification evidence sufficient ?


12. Now we prefer to decide the case in view of the yardsticks mentioned above. Admittedly, test identification parade was held on 14.11.1983 and 18.2.1984, whereas the date of occurrence was in the night of 29.10.1983. The recovered articles were identified on 21.11.1983 though the recovery was made on 31.10.1983. Since the recovery has not been alleged against the present appellants, we only discuss about the identification of the accused persons in test identification parade conducted by the prosecution. On 14.11.1983, P.Ws.1,2,4,6 and 10 identified three appellants namely, Pancham Roy, Dara Paswan and Baleshwar Roy, whereas on 18.2.1984, the 4th appellant Rajendra Mandal was identified by P.Ws.2 and 10. So far as identification by P.Ws. 1, 2, and 4, is concerned, their evidence carries no meaning in view of the fact that they were not examined under Section 161 of the Code of Criminal Procedure. So far as P.W.6 is concerned, in the dock, he identified only Sarfuddin and Shyam Lal Mandal who have been acquitted and has not identified the present



appellants. Hence his identification during test identification parade cannot be treated as a substantive piece of evidence.


13. The present appellants were identified only by P.Ws.2 and 10 during test identification parade as well in dock. So far identification of appellant Rajendra Mandal is concerned,, admittedly he was identified on 18.2.1984, whereas he was arrested on 8.11.1983. Hence, his identification after three months of his arrest, carries no meaning as nothing has been brought on record to suggest that this appellant was precluded from seeing the prosecution witnesses for more than three months. The rest of the three appellants were identified on 14.11.1983 though they were arrested on 2.11.1983. It appears that the articles were recovered on 31.10.1983 though test identification parade of the articles was held on 21.11.1983 but immediately after arrest, the prosecution witnesses visited the police station, as has been admitted by P.W.10 in paragraph 22 that he went to the police station after arrest of the accused persons. In such circumstances of the delayed



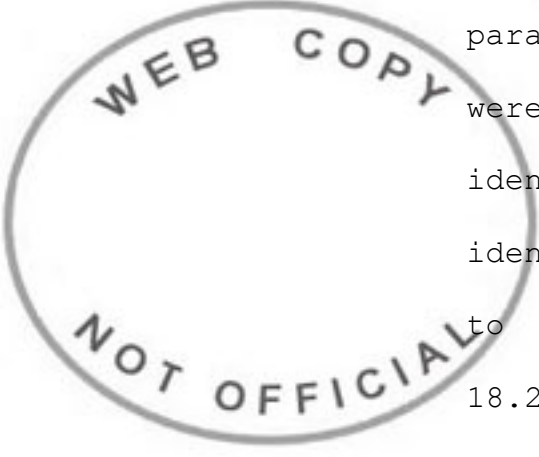


identification of the accused and recovered articles, creates doubt on the identification process. Though suggestion has been given to all prosecution witnesses including P.Ws. 2 and 10 that accused Pancham Roy, Baleshwar Roy and Dara Paswan used to drive rickshaw and they used to park rickshaw near Godeware Chawk whereupon P.W.10 admitted that rickshaw used to be parked near Godeware and in paragraph 20 has admitted that near Godeware Chawk, he used to make purchase from grocery shop of Dukhharan at Goreware Chawk. It is also an admitted fact that both the appellants and the informant are resident of the neighbouring villages as their villages fall within the same Panchayat Amdaha and within the same police station Forbesganj. In these circumstances, not naming the appellants in the first information report creates suspicion about the prosecution version.

14. So far as impartial and fair test identification parade is concerned, it is also under cloud, particularly in view of the evidence of P.Ws.2 and 10 that they were taken to jail by the Investigating Officer, while

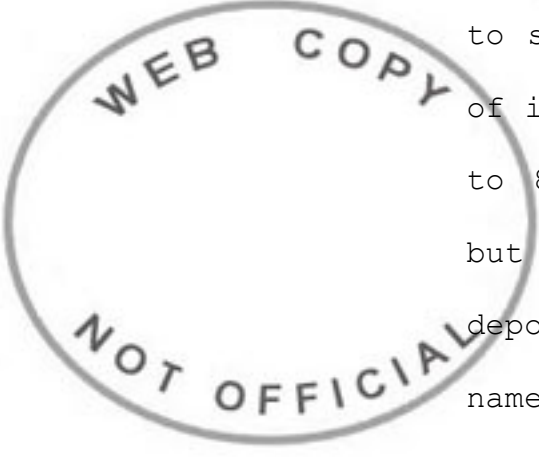


P.W.2, in paragraph 21, has stated that the Investigating Officer was sitting in the jail office. There is nothing specific to suggest that the accused persons were mixed up with other persons having similar appearance, when test identification parade was conducted. Column 5 of the test identification parade requires the specification with regard to manner of identification but the T.I.Chart (Ext.1) dated 14.11.1983 suggests that column 5 has not been filled up properly. The means of identification by all the witnesses suggested that the identification was in the light generated by burning of heap of santhi(straw). Hence it appears that the prosecution has not taken adequate care in conducting the fair test identification parade. Hence, in our view, both identification parades dated 14.11.1983 and 18.2.1984 are not free from suspicion due to non-adopting of a fair procedure, and also due to inordinate delay in conducting test identification parade. Since we have doubted the source of identification and also in the background of doubtful conduction of test identification parade, we are unable to rely on




the evidence of P.Ws.2 and 10. P.W.10 in paragraph 21 has stated that 20 to 25 people were altogether present in course of identification. Admittedly, the test identification parade was done only with regard to seven persons on 14.11.1983, whereas on 18.2.1984 altogether two persons were put on test identification parade. Hence the prescribed norms with regard to mixing up one accused with others having similar appearance has not been followed. The T.I.Chart further reflects that none of the identified witness including P.Ws.2 and 10 have stated about any accused to have done any overt act or was armed with any weapon except with regard to accused Rajendra Mandal who is alleged to have been armed with lathi but his identification after more than three months creates serious doubt about his identification.

15 The evidence of informant P.W.10 further creates doubt about manner of occurrence as alleged. In the fardbeyan, it is mentioned that he came to know about the death and the injury to several persons through villagers. It appears very unreasonable that he




did not bother to go to the residence of P.W.3 to see the seriously injured. So far as number of injured is concerned which is varying from 4 to 8 in the evidence of P.Ws. 1,6,7 and 10, but none of the injured has come forward to depose in the case, except P.W.7 who has not named any of the accused persons or has not been sent for identifying the accused in the test identification parade. P.W.3 is a witness, in front of whose house the victim Md.Aiyub received injury and was an important witness, he should have been sent for identifying the accused but he was also withheld. Hence, it appears that only family members were sent for identification. P.Ws. 2 and 10 who are related to each other have claimed to have identified the accused persons. Admittedly, the prosecution has claimed that three firings were made by the accused persons but the prosecution witnesses deposed that 7-8 persons were injured. This kind of evidence does not appear to be convincing, particularly, in view of the fact that injury of none of the injured has been brought on record including that of the informant.




16. P.W.10 in his fardbeyan has specifically stated that second firing was made near the house of P.W.3. It appears that the said firing hit Md.Aiyub, son of P.W.3, who subsequently succumbed to his injury. The inquest report suggests that he received splinter injuries from waist to armpit, on the right hand three pellet injuries, the injury beyond his private part and in the back and left ear. It also does not appear that such injury was caused by one shot though P.W.11 Doctor who conducted post mortem has found multiple pellet marks on the right side of front of chest and abdomen. Hence this contradiction creates doubt about the informant's version of the occurrence.

17. Learned Trial Court acquitted six accused, though accepting that the recovery was made from them and they were identified by the prosecution witnesses on the ground that those accused persons were known to the prosecution side and seizure list has not been proved as seizure list witnesses have not been examined. We do not find any reason for not conferring the same benefit by the trial court



to the present appellants in view of the fact that specific suggestions were given to the prosecution witnesses with regard to the present appellants that their residences are also in close proximity to the residence of informant's side but that fact has not been assessed properly. In such circumstances if they were known to each other, their names should have been mentioned in the first information report. P.W.1 in paragraph 6 has specifically stated that the accused and the informant's side were knowing each other and hence in the circumstances, this Court is unable to uphold the conviction on the basis of identifications made by P.Ws.2 and 10.

18. We fail to understand the conviction of the appellants under Section 396 of the Indian Penal Code as Section 396 of the Penal Code defines "dacoity with murder". The dacoity has been defined in Section 391 which clearly suggests that when five or more persons conjointly commit or attempt to commit robbery, then the act of dacoity is said to be constituted. Since six accused persons were acquitted, hence the conviction of four



appellants under Section 396 of the Indian Penal Code appears to be bad though there is no argument that the charge was framed under Section 396 of the Indian Penal Code but they could have been convicted under Section 394 of the Indian Penal Code. Since this Court has not believed the identification made by the prosecution witnesses, the appellants deserve to be acquitted.

19. In view of the aforesaid discussions, we are unable to hold that the prosecution has proved the case beyond the shadow of all reasonable doubts. Hence the judgment of conviction and order of sentence are set aside and the appellants are acquitted of the charge. The appellants are directed to be discharged from the liabilities of their respective bail bonds.

20. Accordingly, this appeal is allowed.

(Shyam Kishore Sharma, J.)